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February 10, 2003

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BY HAND DELIVERY

Mr. Jeff S. Jordan
Supervisory Attorney
Central Enforcement Docket
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: MUR 5342

Dear Mr. Jordan:

This office represents the Chamber of Commerce of the United States ("Chamber"), the National Beer Wholesalers Association ("NBWA"), and the Business-Industry Political Action Committee ("BIPAC") (collectively "Respondents") in the above captioned MUR. Our clients received a copy of a complaint filed by the Foundation for Taxpayer & Consumer Rights ("Complaint") on January 6, 2003. As will be detailed below, the Complaint is based upon an inaccurate interpretation of the law resulting in factual allegations that fail to state a claim that a violation has occurred. Furthermore, none of the Respondents have otherwise engaged in corporate communications that are prohibited by law. Therefore, the Commission should find no reason to believe that any Respondent violated the Federal Election Campaign Act of 1971, as amended ("Act").

THE COMPLAINT

The Complaint alleges that Respondents violated 2 U.S.C. § 441b because "it is unlawful for a corporation to make a contribution or expenditure in connection with a national election, ... that is directed at rank and file workers, unless that expenditure is nonpartisan in nature, or is intended solely to get out the vote, and does not express a preference for any candidate."

The sole factual basis for the alleged violations consists of vague and unsubstantiated hearsay from materials attributed to Piper Rudnick LLP ("Piper"), an entity unaffiliated with any of the Respondents. The Complaint quotes the following statements from one of fifty pages of the Piper materials attached to the Complaint:

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U.S. Chamber of Commerce: Prints tens of thousands of 'Vote! It's Your Business' inserts for employees' paycheck envelopes in states with key Senate and House races;

National Beer Wholesalers Association (NBWA): Insert voting information fliers into employees' paycheck envelopes;

Business and Industry Political Action Committee (BIPAC): Develop voter guide for 5,000 companies/20 million employees.

THE RESPONDENTS

The Chamber is the world's largest federation of business companies and associations with an underlying membership of over 3,000,000 businesses and business associations. The Chamber provides various member services as well as advocates a pro-business agenda in all branches of the federal government.

The NBWA is an incorporated trade association representing more than 1,850 licensed independent beer wholesalers. The purpose of NBWA is to advocate before government and the public on behalf of its members, to encourage the responsible consumption of beer, and to provide programs and services to its members.

BIPAC is two different entities. BIPAC's Institute for Political Analysis is a not-for-profit corporation that engages in political analysis, research, and communications for the benefit of its members. BIPAC is also a non-connected political committee registered with the Commission. BIPAC refers to the political committee as the BIPAC Action Fund. BIPAC's Institute for Political Analysis is the respondent in this matter.

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THE LAW¹

It is unlawful for a corporation "to make a contribution or expenditure in connection with any election." 2 U.S.C. § 441b. Excluded from the definition of "expenditure" is "nonpartisan activity designed to encourage individuals to vote." *Id.*

§ 431(9)(B)(ii). The corresponding regulation explains that "corporations and labor organizations shall engage in such activity in accordance with 11 CFR 114.4 (c) and (d)." 11 C.F.R. § 100.8(b)(3).²

Section 114.4(c) is entitled "*Communications by a corporation or labor organization to the general public*," and addresses, among other things, "*Registration and voting communications*," "*Voting records*," and "*Voting guides*" disseminated by corporations. Corporations are permitted to engage in all of these types of communications provided that they do not (1) "expressly advocate" the election or defeat of a clearly identified candidate, or (2) coordinate the communications with a candidate or political party. 11 C.F.R. § 114.4(c)(2), (4), (5)(i).

Section 114.4(d) allows "*Registration and get-out-the-vote drives*." Similarly, (1) "a corporation shall not make any communication expressly advocating the election or defeat of any clearly identified candidate(s) or candidates of a clearly identified political party as part of the voter registration or get-out-the-vote drive," and (2) "[t]he registration or get-out-the-vote drive shall not be coordinated with any candidate(s) or political party." *Id.* § 114.4(d)(1), (2).

Thus, corporate expenditures for get-out-the-vote and other public voting communications are permissible provided that they do not expressly advocate the election or defeat of a clearly identified candidate and are not coordinated with a candidate or political party.

¹ The Complaint is directed at activities undertaken prior to the 2002 election. Therefore, the applicable law is that prior to the November 6, 2002, effective date of the Bipartisan Campaign Reform Act.

² This regulation, as well as others discussed below, contain other requirements. However, they are not relevant to the allegations in the Complaint.

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DISCUSSION

A. There is No Reason to Believe a Violation Occurred Based upon the Allegations in the Complaint.

1. The Complaint is based upon an inaccurate interpretation of the law.

The Complaint's superficial comprehension of the law is belied by the regulations interpreting 2 U.S.C. § 441b's general prohibition of corporate expenditures. The legal grounding of the Complaint is based upon two faulty criteria that it claims govern corporate communications about voting. The first is an uninformed understanding of the term "nonpartisan." The second is the Complaint's patently incorrect definition of express advocacy — "express a preference for any candidate."

The Complaint is correct when it says that corporate communications must be "nonpartisan." However, the Complaint does not explain what that term means. "Nonpartisan" is the statutory term used in the exception to the definition of "expenditure" that permits corporations to engage in "nonpartisan activity designed to encourage individuals to vote." 2 U.S.C. § 431(9)(B)(ii). The regulations governing this type of corporate activity, detailed above, provide meaning to the phrase "nonpartisan" — activity that does not expressly advocate the election or defeat of a clearly identified candidate and is not coordinated with a candidate or political party. If corporate communications about voting satisfy this standard, then they are deemed "nonpartisan" and are permissible. *See FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (communications must expressly advocate the election or defeat of a clearly identified candidate to be subject to § 441b).

The above described regulations also illustrate the fundamental flaw in the Complaint's second criterion that corporations cannot engage in communications about voting that "express a preference for any candidate." The regulations restrict the content of corporate communications based upon whether they expressly *advocate* the election or defeat of a clearly identified candidate, not whether they "express a *preference* for any candidate." (Emphasis added). Express advocacy exhorts electoral action with regard to specific candidates. 11 C.F.R. § 100.22. Expression of a "preference" is interpreted subjectively and encompasses more

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speech, and not necessarily that which requests electoral action. The Complaint's more expansive standard for speech regulation is unsupported by federal law and regulations, and would violate the First Amendment of the Constitution. *See Buckley v. Valeo*, 424 U.S. 1 (1976).

Properly stated, the legal standard for evaluating the Complaint's allegations of inappropriate corporate expenditures for get-out-the-vote and other voting communications is (1) whether the communications expressly advocated the election or defeat of a clearly identified candidate, or (2) whether they were coordinated with a candidate or political party.

2. The Complaint does not allege a violation of the proper legal standard.

The Complaint fails both parts of the above-described legal standard by neglecting to allege either one. First, the Complaint fails to allege that any of the Respondents' communications contained express advocacy.³ The quotes from the Complaint describing Respondents' alleged communications do not contain, or otherwise allege, express advocacy. Nor do the Complaint or the Piper materials specify the communications to which they refer.

The Complaint claims that the Chamber printed materials with the phrase "Vote! It's Your Business." However, this is not express advocacy. The statement exhorts the reader to vote, but does not identify any candidate let alone a *clearly* identified candidate for whom the reader should vote. The Complaint's allegations against NBWA and BIPAC fail to allege any specific speech at all, let alone express advocacy. Instead, the Complaint fruitlessly accuses them of providing "voting information" and developing "voter guides," activity that is explicitly permitted by the above-cited regulations.

In addition, the Complaint does not allege that any of the Respondents coordinated their communications with a candidate or party, and there is no evidence of any coordination.

³ This critical omission is likely the result of two fundamental problems. First, the Complaint is based on the wrong legal standard — expression of "preference" instead of "express advocacy." Second, the Complaint provides no record of the actual contents of the Respondents' alleged communications that could be examined for express advocacy. Instead, the Complaint relies on a third party's statements that do not claim that Respondents engaged in express advocacy.

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As applied to the proper legal standard, these factual allegations fail to demonstrate that Respondents have engaged in prohibited corporate communications. Federal regulations explain that the Complaint "should contain a clear and concise recitation of the facts which describe a violation." 11 C.F.R. § 111.4(3). The facts in the Complaint do not describe a violation. On this basis alone, no further action should be taken against Respondents.

B. Communications Actually Made by Respondents Are Lawful.

The Complaint's failure to state exactly what was said in alleged violation of the law has put Respondents in the awkward position of having to guess which of their communications the Complaint may be referring to. By not alleging these critical facts, the Respondents are faced with the prospect of doing the Complaint's work. Such burden shifting is not contemplated by the applicable regulations and requires Respondents to futilely prove a negative.

Nevertheless, in an effort to dispose of this matter as expeditiously as possible, Respondents have attached copies of communications that resemble those that are opaquely described in the Complaint. An examination of these materials reveals that they are nothing more than communications about voting that are explicitly permitted by the above-discussed regulations.

The first of these materials are copies of inserts that the Chamber urged its member corporations to include in their employees' paychecks. (Attachment A). Though the inserts said "Vote for Pro-Business Candidates," this is not express advocacy of the election or defeat of *clearly identified* candidates. Unlike the situation in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), the inserts did not identify "Pro-Business Candidates" by name or by any other reference. Therefore, they did not constitute express advocacy and were permissible corporate expenditures.

The second of these materials are copies of a flier produced by NBWA exhorting the reader to "Be Sure to Vote Pro-Beer," "I'm Going to Vote Pro-Beer. Be Sure You Vote Too," "We must have every Pro-Beer Vote at the polls," and "Please vote Pro-Beer on November 5th!" (Attachment B). Nowhere in the flier is the reader informed of the identities of the candidates that NBWA believes to be "Pro-Beer." Because this communication does not contain express advocacy for essentially the same reasons as those stated with regard to the Chamber's insert, the NBWA flier was a permissible corporate expenditure.

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Lastly, the Complaint alleges that BIPAC impermissibly developed a "voter guide." A "voter guide" is a communication that compares the relative position of candidates on political issues. 11 C.F.R. § 114.4(c)(5). Acknowledging the fact, as illustrated above, that the Complaint is replete with overly general language and erroneous interpretations of the law, perhaps the Complaint meant to assert a claim against BIPAC for posting "voting records" on its website.⁴ "Voting records" are communications that indicate how Members of Congress voted on particular bills. 11 C.F.R. § 114.4(c)(4). Attachment C is an example of the voting record that is displayed on BIPAC's publicly available website for former U.S. Congressman, current Maryland Governor, Robert Ehrlich. BIPAC members are permitted to take this information and mold it to develop their own specialized voting records. BIPAC's voting records do not contain express advocacy.⁵ Therefore, BIPAC's expenditures for posting voting records on its website are permissible.

CONCLUSION

At the outset, the Complaint must be dismissed on its face for failing to allege facts that constitute a violation of the law. Respondents have made a good-faith effort to attempt to identify communications they made that are perhaps contemplated by the Complaint. Yet, the expenditures for these communications are explicitly permitted in Federal regulations. For these reasons, the Commission should find no reason to believe that Respondents violated the Act.

Sincerely,



Jan Witold Baran

Attachments

⁴ Respondents' attempt here to read into the Complaint a claim that is not specifically stated brings into stark relief the Complaint's insufficient allegations.

⁵ The voting records indicate BIPAC's preferred position on each bill in relation to the vote cast by the officeholder. This is not express advocacy because it does not advocate a particular electoral result. Rather, it is a statement of BIPAC's position on issues and specific bills voted on by Congress.

ATTACHMENT A

Vote! It's Your Business



Vote for Pro-Business Candidates

Election Day is November 5, 2002

For more information about registration, voting and
absentee ballots, contact your local registrar's office or
visit www.vote4business.com.



VOTE!

It's Your Business

U.S. Chamber of Commerce



United States Chamber of Commerce

¡Vote! Es tú negocio



Vote para los candidatos pro-comercio

El día de las elecciones será el 5 de noviembre, 2002.

Para más información sobre la inscripción, votación, y
voto por correo, favor de contactar a su oficina de
inscripción local o visite nuestra página web,
www.vote4business.com.



VOTE!

It's Your Business

U.S. Chamber of Commerce



Cámara de Comercio de los Estados Unidos

This is a sample insert to be included with your employees' pay checks, prior to the November 5th Elections. For additional copies, contact us by phone (202) 463-5604 or by e-mail, gain@uschamber.com

Esto es un ejemplo del encarte que será incluido con el cheque de sueldo de sus empleados, antes de las elecciones del 5 de noviembre. Si necesita copias adicionales, puede contactarnos por teléfono al (202) 463-5604 o por correo electrónico, gain@uschamber.com.

ATTACHMENT B

2025-01-01

On Tuesday, November 5th



Be Sure to Vote Pro-Beer

**You Can Be Sure The Anti-Beer Voters
Will Be At The Polls.**

**I'm Going To Vote Pro-Beer.
Be Sure You Vote Too.**

It Matters!



National Beer
Wholesalers
Association



This year's election will be the closest ever!
Many elected officials will win their races by only
a small margin.

We must have every Pro-Beer vote at the polls.
Our adversaries have an aggressive anti-beer
agenda, which includes higher taxes, limited
availability and additional advertising restrictions.
Their anti-beer agenda will hurt the industry.

**Please vote Pro-Beer on
November 5th!**

ATTACHMENT C



Prosperity Project

Prosperity Project
About the Prosperity Project
Business and the Electorate
The Thematic Business Agenda

Maryland Governor



Governor Robert L. Ehrlich Jr. (R)
<http://www.gov.state.md.us> (web)
governor@gov.state.md.us (email)

Capital Address:
Office of the Governor
State House, 100 State Circle
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District Address:
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State House, 100 State Circle
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Prosperity Project Voting Record on Economic Opportunity

Vote:	107-1 45 on H.R.3	107-1 84 on H.R.8	107-1 255 on H.J.RES.50	107-1 319 on H.R.3005	107-1 481 on H.R.3005	107-2 107-2 264 on H.R.3009	107-2 370 on H.R.3009
Preferred Position:	Y	Y	N	N	Y	Y	Y
Legislator's Vote:	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>

Key:

- 107-1 45 on H.R.3: This vote reached a bipartisan agreement on phase one of tax cuts which were intended to boost consumer confidence in the U. S. economy. Business advocated individual tax relief as an important first step in restructuring the tax code. The vote was 230 to 189 on March 8, 2001.
- 107-1 84 on H.R.8: This vote reduced estate tax rates, enabling Americans to pass along family businesses to future generations. The ability to accumulate assets through hard work and savings is the underpinning of future prosperity. The vote was 274 to 154 on April 4, 2001.
- 107-1 255 on H.J.RES.50: This motion would have used the energy bill as a vehicle to overturn the strong bipartisan agreement on tax reduction. Prosperity is directly related to lower tax burdens for all American taxpayers. The vote was 206 to 223 on August 2, 2001.
- 107-1 319 on H.R.4: This vote permits the President to negotiate with other countries for trade agreements. Job security for the American worker is tied to America's position as a reliable and aggressive competitor in the global economy. The vote was 215 to 214 on December 6, 2001.

107-2 103 on H.R.586: Business planning requires predictability in tax rates. The House voted 229 to 198 to make the reductions that would expire in 2010 permanent. The party split was 1 Republican and 9 Democrats. The vote took place on April 18, 2002.

107-2 219 on H.R.2143: The House voted to make the estate tax exemption permanent on a vote of 256 to 171, with four Republicans and 41 Democrats bolting from their colleagues. The vote took place on June 6, 2002.

107-2 264 on H.RES.450: The House urged their conferees to insist on inclusion of trade promotion authority during negotiations with the Senate on Andean Trade. The vote was 216 to 215, with 14 Republicans and 11 Democrats bolting the party position. The vote was held on June 26, 2002.

107-2 370 on H.R.3009: This vote approved the conference report on the market expansion package which included authority for the president to negotiate trade agreements. The vote was 215 to 212 and took place on July 27, 2002.

Prosperity Project Voting Record on Economic Strength

Vote:	107-1 33	107-1 181	107-1 288	107-1 311	107-1 320	107-1 464	107-1 484	107-1 520	107-2 62	107-2 421
	on 181	on 288	on 311	on 317	on 320	on 464	on 484	on 520	on 62	on 421
	S.J.RES.6	H.R.2217	H.R.2620	H.R.4	H.R.4	H.R.4	H.R.4	H.R.4	H.R.2341	H.R.4600
Preferred Position:	Y	N	N	N	N	N	N	N	Y	Y
Legislator's Vote:	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>

Key:

107-1 33 on S.J.RES.6: This vote repealed the Labor Department's rules on workplace safety, known as the ergonomics debate. Business disapproved of rules that were enacted without congressional authority that were based on untested scientific principles. Employers are proud of their record in safety training designed to protect workers while on the job. The vote was 223 to 206 on March 7, 2001.

107-1 181 on H.R.2217: This amendment banned energy exploration in certain areas in the Gulf of Mexico. With advanced technology and stringent standards, American companies have explored for oil and gas in some of the world's most sensitive environments. Congress should not let unfounded fear put accessible territory off limits without sound reasons to do so. The vote was 247 to 164 on June 21, 2001.

107-1 288 on H.R.2620: This amendment would have banned funding for further studies prior to the enactment of particulate standards for water. Business and many municipal water users felt that federal regulators should not be so swift in adopting standards that lacked respected scientific evidence. The vote was 218 to 189 on July 27, 2001.

107-1 311 on H.R.4: This amendment proposed an increase in corporate fuel economy standards. Consumer choice and passenger safety would have suffered if Congress had approved this proposal. A wise energy policy need not conflict with individual decisions about the appropriate vehicle for employment or family needs. The vote was 160 to 269 on August 1, 2001.

107-1 317 on H.R.4: Passage of this amendment would have banned exploration in the Arctic National Wildlife Refuge. American companies use best practices all over the world that prove it is possible to manage resources while protecting the regions where our technology and scientific experts tell us there are supplies of oil and gas. The vote was 206 to 223 on August 1, 2001.

107-1 320 on H.R.4: Final passage of the energy bill was a significant victory for business. American business cannot get the job done without energy. Prosperity depends on consistent supplies at affordable prices with predictable delivery schedules. The vote was 240 to 198 on August 2, 2001.

- 107-1 464 on H.R.3210: This vote, following the attacks of 9-11, enabled business to find insurance against future terrorism claims, with limits on non-economic damages and attorney fees. The legal system should fairly compensate plaintiffs for damages suffered, but an abusive litigious environment harms economic development. The vote was 227 to 193 on November 29, 2001.
- 107-2 62 on H.R.2341: Resolution of costly and potential unwarranted lawsuits requires uniform treatment of all plaintiffs in federal court to prevent trial lawyers from shopping for excessive claims. The vote on this reform measure was 223 to 190, with 5 Republicans and 17 Democrats splitting from their parties. The vote took place on March 13, 2002.
- 107-2 421 on H.R.4600: The House passed caps on attorney fees in medical malpractice cases. Business has argued that open-ended jury awards, far beyond damages sustained, has driven up the cost of health care premiums. The vote was 217 to 203 and took place on September 26, 2002.

Prosperity Project Voting Record on Quality Workforce

	107-1 130 on H.R.1	107-1 328 on H.R.2563	107-1 330 on H.R.2563	107-2 92 on H.R.3762
Vote:	N	Y	Y	Y
Preferred Position:	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Legislator's Vote:	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>

Key:

- 107-1 130 on H.R.1: The vote on this amendment kept mandatory math and reading tests as part of the overall education package. Business opposed efforts to eliminate testing for grades 3 to 8. A competitive world economy demands a first-class workforce that comes to the job with basic skills. Productivity suffers when industry has to retrain because of failing schools. The vote was 173 to 255 on May 22, 2001.
- 107-1 328 on H.R.2563: This amendment allowed increases in medical savings accounts along with association health plans that pool risk and lower premium costs. Employer-based health care depends upon controlling costs while expanding access to insurance. The vote was 236 to 194 on August 2, 2001.
- 107-1 330 on H.R.2563: This amendment would have placed limits on lawsuits arising from medical malpractice cases. Business believes that expanded litigation results in higher costs, which leads directly to more uninsured workers and their families. The vote was 207 to 221 on August 2, 2001.
- 107-2 92 on H.R.3762: Protections on corporate-sponsored retirement funds passed the House 255 to 163. There were 2 Republicans and 46 Democrats splitting with their caucuses. The vote took place on April 11, 2002.

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